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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY EUGENE SMITH,

Defendant and Appellant.

B215554

(Los Angeles County
Super. Ct. No. TA096016)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gregory Eugene Smith appeals from the judgment entered following a court trial in which he was convicted of voluntary manslaughter. Defendant challenges the sufficiency of the evidence. We affirm.

BACKGROUND

Late at night on March 9, 2008, Centrail “Rock” Lindsey picked a fight with defendant outside the Compton apartment building where defendant lived with his family. Lindsey said something to defendant, then punched him in the face, causing defendant to bleed from his lip. Lindsey then followed behind and yelled at defendant as he walked to a gas station to purchase cigars. When defendant arrived home, he went inside his family’s apartment. One or more of the men outside the building—Lindsey, Kevin Canody, and Maurice Morris—called defendant to come outside “like everything was fine.” Defendant emerged and spoke with Canody and Morris. An argument erupted between defendant and Lindsey. Defendant went back inside his family’s apartment. Lindsey came up to the door of the apartment, where he cursed and shouted at defendant to come out and fight. Lindsey told defendant, “Eventually you have to catch my fade,” which meant that they would fight one another eventually.

Defendant’s sister, Evetta Smith, asked who Lindsey was talking to. Lindsey said, “I’m talking to your brother, homegirl,” and called her a bitch. Defendant’s mother, Inga James, went outside and told Lindsey not to speak that way to her daughter. Evetta followed her mother outside. Lindsey called James a bitch and James and Evetta argued with Lindsey. Lindsey continued to demand that defendant fight him and attempted to get past the women to reach defendant, who was standing behind the women, near the door. Defendant repeatedly asked his mother and sister to come in the house, saying, “It’s not that serious. Just forget about it.” A man named Trent pulled Lindsey back toward the sidewalk. According to witness Zedric Surles, one of the women carried a frying pan. Canody testified that Evetta swung a metal chair at Lindsey, but “nobody got hit.” Morris testified that James, Evetta and about five other women attacked Lindsey with a plastic lawn chair and other objects as he attempted to ride away on his bicycle. Evetta denied

that she or her mother had a frying pan or chair outside. James denied that she or Evetta held anything other than a mobile phone and denied that either of them struck or threatened Lindsey. Surles testified that one of the women told Lindsey that they were not afraid of him, and he replied, “I would knock a bitch out” or “I’ll knock you out,” followed by, “Hit me, I dare you.” James denied that she or Evetta said anything like that to Lindsey. Lindsey also said he would fight anyone who tried to do anything to him. According to James, Lindsey repeatedly said, “This is Palmer Block,” and made other statements mentioning his gang. Morris testified that James threatened to send the Nutty Blocks gang after Lindsey.

Evetta and James testified that after Trent got Lindsey outside the yard and gate, Evetta went to close the gate to keep Lindsey out. Lindsey cursed at her and swung his hand at her. She blocked the blow with her forearm, but Lindsey kicked her leg.

Evetta testified that she heard a gunshot as she stood near the gate looking at Lindsey. Lindsey ran away in a bent-over position. Evetta looked up and saw defendant pointing a gun toward Lindsey and firing it. Defendant was about six or seven feet from Lindsey when he fired the gun. The shots were fired in quick succession. Two days after the shooting, Detective Steven Katz visited the crime scene and interviewed Evetta and James. Evetta showed Katz where she and Lindsey were when defendant began shooting. Katz measured the distance between Evetta’s position and Lindsey’s position as about 30 feet. Although Evetta testified that Lindsey only swung at her once and only kicked her once, she agreed with defense counsel’s leading question on cross-examination that Lindsey was “still attacking” her when she heard the first shot.

James testified that defendant quickly ran past her when Lindsey hit Evetta, then Lindsey began running away before she heard the first shot. The shots were fired in quick succession. Neither Lindsey nor defendant was in view when James heard gunshots, but Evetta was still by the gate. James ran from the porch to the gate and saw Lindsey and defendant further down the block. Defendant was standing on the sidewalk and Lindsey

was running across the street. Canody ran up and grabbed defendant. Defendant broke free and ran back to the apartment building.

Surles was inside the apartment of defendant's cousin, which was across the hall from the apartment occupied by defendant's family. Surles testified that he heard the door to defendant's apartment open and close, then everything quieted down for about a minute. The next thing he heard was two or three gunshots. About a minute after the shots, defendant entered his cousin's apartment, looking shocked. Someone asked him what happened, and he said, "I just had to. I just had to." Someone asked defendant where the gun was, and he said he had already gotten rid of it.

Morris testified that he turned and walked toward the back of the apartment building as the group of women attacked Lindsey. After a minute, he heard a series of six gunshots, with a pause of about one and one-half seconds between the first and second shots. On a prior occasion, Morris had heard Lindsey claim membership in the Palmer gang. Morris and Canody were members of the Santana gang, which got along with the Palmer gang.

Canody testified that things calmed down for about five minutes after the argument between Lindsey, Evetta, and James ended. Evetta and James were on their porch. Canody and Lindsey were talking in front of "the next apartment" when Lindsey's eyes got wide. Lindsey turned and tried to run. Canody heard a gunshot and saw Lindsey fall. Canody turned to see "what it was," but something struck his head and the blood in his eyes obscured his vision. Canody then heard additional gunshots. The second shot was about one and one-half seconds after the first shot. Canody denied he was a member of the Santana gang or any Crips gang and denied that either he or Lindsey sold drugs in the block where the crime occurred.

Surles, Evetta, James, and Morris testified that Lindsey did not threaten to kill anyone; Lindsey just stated a desire to fight with defendant. Evetta and James testified that Lindsey did not threaten to harm them. On cross-examination, James agreed with assertions that Lindsey was "threatening" her, Evetta, and defendant. On redirect

examination, she clarified that she was referring to Lindsey's conduct of hitting and kicking Evetta, and that Lindsey made no threatening statements to Evetta. No one testified that Lindsey had or appeared to have a gun.

The parties stipulated that if Precious Barnes were called to testify, she would testify that (1) on three or four occasions she saw Lindsey argue with defendant, push defendant, and ask him if he was "messaging" with Lindsey's girlfriend; (2) on each of these occasions, defendant walked away; (3) during one of these incidents she heard Lindsey tell defendant that he had "'better get a gun'" because Lindsey was going to kill him; and (4) defendant phoned her at an unspecified time, crying and asking her to come home because Lindsey was outside trying to fight defendant. The parties further stipulated that when investigators interviewed Barnes soon after the crime, she did not mention any threat by Lindsey against defendant.

Lindsey had three gunshot wounds. One nonfatal wound resulted from a bullet that struck the left side of his neck and traveled from back to front at a downward trajectory of about 45 degrees. Because Lindsey was 6 feet 1 inch and defendant was 5 feet 7 inches, Lindsey may have been on his knees, on the ground, or crouched down when the shot struck him. A second nonfatal wound entered the left side of Lindsey's back at an upward trajectory, which was also consistent with Lindsey crouching when struck. The fatal wound was caused by a bullet that entered the right side of Lindsey's lower back at an upward trajectory of about 45 degrees and went through his heart and right lung. If a 5 feet 7 inches tall gunman were standing up straight six or seven feet away from Lindsey and extending the gun out toward Lindsey, Lindsey's torso would have to have been leaning forward at an angle of 45 degrees for the bullet to follow the trajectory of this fatal wound.

Police recovered defendant's gun, which was a six-shot revolver, in a closet inside his family's apartment. It contained six expended casings.

Defense gang expert Detective Rick Sullivan testified that gang members who sell drugs in neighborhoods they "control" usually hide their guns near where they are selling,

rather than carrying them. The block where the shooting occurred is “known as” a Palmer Block gang neighborhood. Sullivan opined that if a person who was not a member of the Palmer Block gang pointed a gun at a member of the Palmer Block gang, retaliation would be likely, but it would not necessarily be immediate.

Defendant testified that up until March of 2008, he and Lindsey were friends. Then one day Lindsey approached and said that he had heard that defendant had been saying something negative about him. Defendant denied it. Lindsey warned him, ““Then don’t drip. We got guns too.”” Defendant understood this to be a threat referring to the Palmer Block gang. Defendant knew that Lindsey was a “big time” member of the Palmer Block gang. On another day, Lindsey accused defendant of “messing with his girl.” Defendant denied it, and Lindsey said, ““Don’t let me find out different because you know what I’m about.”” Defendant understood this as a threat, too. On another occasion, Lindsey argued with defendant and told defendant to “watch [his] back.” Defendant had seen Lindsey get into fights, but had never seen him with a gun. Defendant knew that some Palmer Block gang members who lived in the neighborhood had guns. He also knew that two Palmer Block gang members lived directly across the street from his family’s apartment and he guessed that the gang “stashed” guns in the residence of these two members. Defendant also knew that Lindsey sold drugs “in front of that apartment building.”

On the day of the shooting, defendant went outside to walk to the store and heard someone call his name. He walked over to where Morris, Canody, and Lindsey were. As defendant spoke to Morris and Canody, he noticed that “something was wrong with” Lindsey. Lindsey asked defendant if he had any “weed.” Defendant said he didn’t and turned to go to the store. Lindsey grabbed defendant by his shirt, then punched him in the face, knocking him to the ground and splitting his lip. Defendant asked why Lindsey had punched him, but Lindsey did not answer. As defendant walked to the store, Lindsey followed him, loudly telling defendant that he wanted to fight and accusing defendant of “sleeping with his girl.” Lindsey threatened that if defendant did not fight him, he would

kill defendant. Lindsey also said he knew where defendant's mother lived and where defendant's siblings attended school. Lindsey kept this up all the way to the store. When defendant emerged from the store, Lindsey tried to grab him. Lindsey handed his jacket to Trent, who joined Lindsey in following defendant home. On the journey back, Lindsey continued to repeat his accusation and demand for a fight, and threatened to kill defendant.

When defendant arrived home, he went inside to check the condition of his lip. He told his mother what had happened and went in the bathroom to look in the mirror. When he emerged from the bathroom, he heard his mother outside talking to Lindsey.

Defendant went outside and stood behind his mother and Evetta. Lindsey repeatedly called Evetta and defendant's mother "bitch." Everyone, including defendant and Trent, tried to calm Lindsey. Trent pulled Lindsey toward the gate. Lindsey continued to talk "smack" to defendant's mother and said, "Your son is a bitch and he's going to get his. Trust me he going to get his on Palmer." Defendant understood this to mean that

Lindsey or his gang was going to beat or kill defendant. Lindsey swung at Evetta.

Defendant drew the gun he had been carrying in his pocket since he left to go to the store and ran toward Lindsey and Evetta. Defendant fired, Lindsey ran, and defendant fired five more times at Lindsey's back. Defendant testified on direct examination that Lindsey was still hitting or kicking Evetta when defendant fired his gun, but admitted on cross-examination that Lindsey only swung at Evetta once and kicked her once, and was not hitting or swinging at or kicking her when defendant fired the first shot. In addition, Lindsey was about four feet from Evetta when defendant fired the first shot. Defendant testified, "I felt like I had to try to defend my family. He made threats he was going to kill my family and then he punches my sister." Defendant did not want to fight Lindsey with his fists because defendant was "a little dude." Defendant did not believe that calling 911 would stop Lindsey from hitting and kicking Evetta, and he believed Lindsey could get a gun from the apartment across the street and return before the police arrived.

Defendant testified that he continued to shoot “[b]ecause I felt that if I didn’t get him that he was going to come back and retaliate.”

Defendant told Katz that he pulled out his gun, “closed [his] eyes and it went off, you know.” At trial, defendant denied saying he closed his eyes. Defendant also told Katz he did not know how many shots he fired.

Defendant waived his right to a jury trial and the prosecutor dismissed the murder charge. At the close of the prosecution’s case, the court, on its own motion, dismissed the assault with a deadly weapon charge. The court convicted defendant of voluntary manslaughter and found he had personally used a gun in the commission of the offense. The court sentenced defendant to six years in prison.

DISCUSSION

Defendant contends that the evidence was insufficient to establish that the homicide was unjustified, that is, not committed in self-defense or defense of another. At trial, the prosecutor did not dispute that defendant acted from an actual belief in the need to defend himself or someone else, but disputed the reasonableness of the belief.

Defendant argued that he should be acquitted because his belief was reasonable, citing factors such as the history of Lindsey threatening defendant and punching him in the face, the time it would take for the police to arrive, Lindsey’s “thug” status, the availability of guns across the street, and the likelihood that Lindsey would react to defendant pulling a gun on him by getting one of those guns and returning to shoot defendant. Defendant’s appeal essentially reargues the same theory.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Although the ultimate test of the reasonableness of the defendant’s

belief is objective, the trier of fact must consider what would appear to be necessary to a reasonable person in the position of defendant, with the defendant's knowledge and awareness. (*Id.* at pp. 1082–1083.) A fear of future harm is insufficient, even if it is certain that great harm will result. (*Id.* at p. 1082.)

Self-defense is limited to the use of force that reasonably appears to be necessary to resist the other party's misconduct; the use of excessive force destroys the justification. (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629–630.) The right of self-defense does not include a right of attack (*People v. Holt* (1944) 25 Cal.2d 59, 66), and it endures only as long as the real or apparent danger (*People v. Pinholster* (1992) 1 Cal.4th 865, 966).

The prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1429.)

Similarly, a defendant is justified in using reasonable force to defend another person against an imminent danger of death or great bodily injury. (Pen. Code, § 197, subdivision 1; *People v. Randle* (2005) 35 Cal.4th 987, 997–998, disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1177, 1201.) In this context, “reasonableness is tested from the point of view of the defendant, not the point of view of the person being defended.” (*People v. Genovese* (2008) 168 Cal.App.4th 817, 830.)

Although the trial court did not state its findings of fact at the time it announced its verdict, it revealed some of its findings while explaining its sentencing choice: “[T]he bottom line is the victim in the case made absolutely no threats to kill Mr. Smith. There was no evidence at all that the victim had a weapon with him at that time or had immediate access to a weapon at the time that Mr. Smith used deadly force. [¶] So clearly, and again the court looked at CALCRIM 3474 in finding that homicide was not justified. Just to point out specifically, that instruction says, ‘When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.’ And that’s exactly what we had here. [¶] The defendant’s own testimony indicated the victim was running away when he was shot. And I understand the defense’s position. But I think it’s pure speculation that he was attempting to go get a

weapon at that time. And again, there was no evidence at all that he even had a weapon. The defendant said himself he never saw him with a weapon. [¶] So clearly under our law, the homicide was not justified. Certainly I also considered whether it was self-defense. And I think both counsel in their own way pointed out what we really have here is a textbook example of voluntary manslaughter, where the defendant probably did believe that deadly force was reasonable. But the fact of the matter is, the use of force was unreasonable. And in fact, there was really no evidence at all that great bodily injury was about to be inflicted on his mom or his sister.”

Substantial evidence supports the trial court’s finding that defendant’s belief in the necessity of defending his family members was unreasonable because Lindsey did not pose an imminent danger of death or great bodily injury when defendant shot him. Canody testified that the argument and physical fight between Lindsey and defendant’s family had ceased and Canody and Lindsey were talking a short distance away when Lindsey ran away and defendant began shooting. Surles testified that after the argument between Lindsey and defendant’s mother and sister, everything was calm and quiet for about a minute before the shooting began. James testified that Lindsey had walked down the block and out of her sight, while Evetta was still near the gate, when defendant fired the first shot. Similarly, Evetta testified that Lindsey’s attack on her, consisting of one punch and one kick, had ended and Lindsey was 30 feet away from her when defendant began shooting. Although the account of each of these witnesses differed in various respects, they all established that Lindsey was neither applying, nor threatening imminent application of force likely to cause death or great bodily injury to Evetta or anyone else when defendant began shooting. The trial court was not required to credit defendant’s conflicting and self-contradicted testimony that Lindsey was still attacking Evetta when defendant opened fire. Defendant admitted that Lindsey only swung at Evetta once and kicked Evetta once and was four feet from Evetta when defendant began shooting. Thus, defendant was not justified in firing the first shot. Defendant’s claim of justification for the other five shots was even less plausible, as it was undisputed that Lindsey was

running away while defendant fired all of the rounds left in his gun. Lindsey's flight was corroborated by the forensic evidence revealing that all of the bullets that struck Lindsey entered from behind, probably when he was bent over and running, as Evetta testified. Defendant's testimony that during the walk to and from the store Lindsey had said he knew where defendant's mother lived and where his siblings attended school also failed to make defendant's use of deadly force reasonable, as these were not threats of immediate great bodily injury or death, but, at most, vague threats of some unspecified future harm. As the court noted, there was no evidence that Lindsey was in possession of any weapon, and defendant's belief that Lindsey could get one was both speculation and insufficient to create an imminent threat of great bodily injury or death.

For essentially the same reasons, substantial evidence supports the trial court's finding that defendant's belief in the necessity of defending himself against Lindsey was unreasonable. The trial court, which watched and heard both defendant's testimony and his videotaped statement to the police, was free to disbelieve defendant's testimony that Lindsey threatened to kill him. Evetta, James, Surles, and Morris testified that Lindsey just sought a fight with defendant. The speculative possibility that defendant would be injured *if* he fought Lindsey did not transform Lindsey's demand for a fight into a threat of imminent death or great bodily injury. Defendant did not open fire on Lindsey while Lindsey was beating him during a fight. He instead refused to fight and shot Lindsey without Lindsey even attempting to apply any force to defendant. According to Canody, Evetta, and James, Lindsey had moved down the street, away from defendant's apartment before defendant began shooting. According to James and defendant himself, defendant ran from somewhere near the porch or entry door through the yard to the sidewalk or even farther down the sidewalk to shoot Lindsey. No reasonable person would believe that Lindsey posed any danger, let alone an imminent danger of death or great bodily injury to defendant when defendant fired any of the six shots. Defendant's theory about the likelihood that Lindsey would go get a gun and come back and shoot him if defendant did

not kill Lindsey is based upon speculation, ignores the requirement of imminence, and attempts to eliminate the objective component of the self-defense standard.

For all of these reasons, defendant's claim fails. Substantial evidence supports the trial court's findings and verdict.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.